

Before the
UNITED STATES
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16-CRB-0003-PR (2018-2022)
(Remand)

**COPYRIGHT OWNERS' OPPOSITION TO SERVICES' MOTION TO STRIKE
PORTIONS OF COPYRIGHT OWNERS' REBUTTAL TESTIMONY**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
I. STANDARDS ON THE MOTION	6
A. Scope of rebuttal evidence	6
B. Burden to show disruption	8
II. ARGUMENT	10
A. The Rebuttal Reports far exceed the threshold for allowable rebuttal evidence	10
1. The Order to Compel confirms that the topics in the Rebuttal Reports are directly related to the Services’ initial submission	10
2. The Eisenach Rebuttal Report	12
3. The Watt Rebuttal Report	13
4. The Spulber Rebuttal Report	14
III. The complaint about an “evidentiary dump” of royalty statements obtained from the Mechanical Licensing Collective is a red herring	15
IV. The Services’ surrebuttal arguments demonstrate why there is no need for a surrebuttal	16
V. CONCLUSION	19

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(s)</u>
<i>Bell v. AT&T</i> , 946 F.2d 1507 (10th Cir. 1991)	7
<i>Crowley v. Chait</i> , 322 F. Supp. 2d 530 (D.N.J. 2004)	7
<i>Johnson v. Copyright Royalty Board</i> , 969 F.3d 363 (D.C. Cir. 2020)	5
<i>Settling Devotional Claimants v. Copyright Royalty Board</i> , 797 F.3d 1106 (D.C. Cir. 2015)	8

STATUTES AND RULES

17 U.S.C. 115	15
37 CFR 210.16 (2018)	16, 19
37 CFR 210.34(c)	15
37 CFR 385.12(b) (2016)	18
37 CFR 385.21(b) (2019)	18

OTHER AUTHORITIES

<i>Order Denying SoundExchange Motion to Strike, Web V</i> (Apr. 9, 2020)	8
<i>Order On Copyright Owners' Motion to Compel, Phono III</i> (July 14, 2021)	4, 10, 11, 12, 15
<i>Order On Excluding Testimony, Phono III</i> (July 24, 2017)	6
<i>Order On Music Choice's Motion to Strike and Sirius XM's Motion to Strike, SDARS II</i> , (Aug. 3, 2012)	8
<i>Phonorecords I</i> , 74 Fed. Reg. 4,510 (Jan. 26, 2009)	9
<i>SDARS II</i> , 78 Fed. Reg. 23,054 (Apr. 17, 2013)	9
<i>SDARS III</i> , 83 Fed. Reg. 65,210 (Dec. 19, 2018)	9
<i>Treatment of Confidential Information by the Mechanical Licensing Collective and the Digital Licensee Coordinator</i> , 86 Fed. Reg. 9,003 (Feb. 11, 2021)	15, 16

WEBSITE

https://www.regulations.gov/comment/COLC-2020-0004-0010	16
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National Music Publishers' Association and Nashville Songwriters Association International (together, "Copyright Owners") respectfully submit this opposition to the motion (the "Motion") by Amazon, Google, Pandora, and Spotify (collectively, the "Services") to strike portions of the written rebuttal testimony of Dr. Jeffrey A. Eisenach, Prof. Richard Watt and Prof. Daniel F. Spulber (the testimony together, the "Rebuttal Reports").

PRELIMINARY STATEMENT

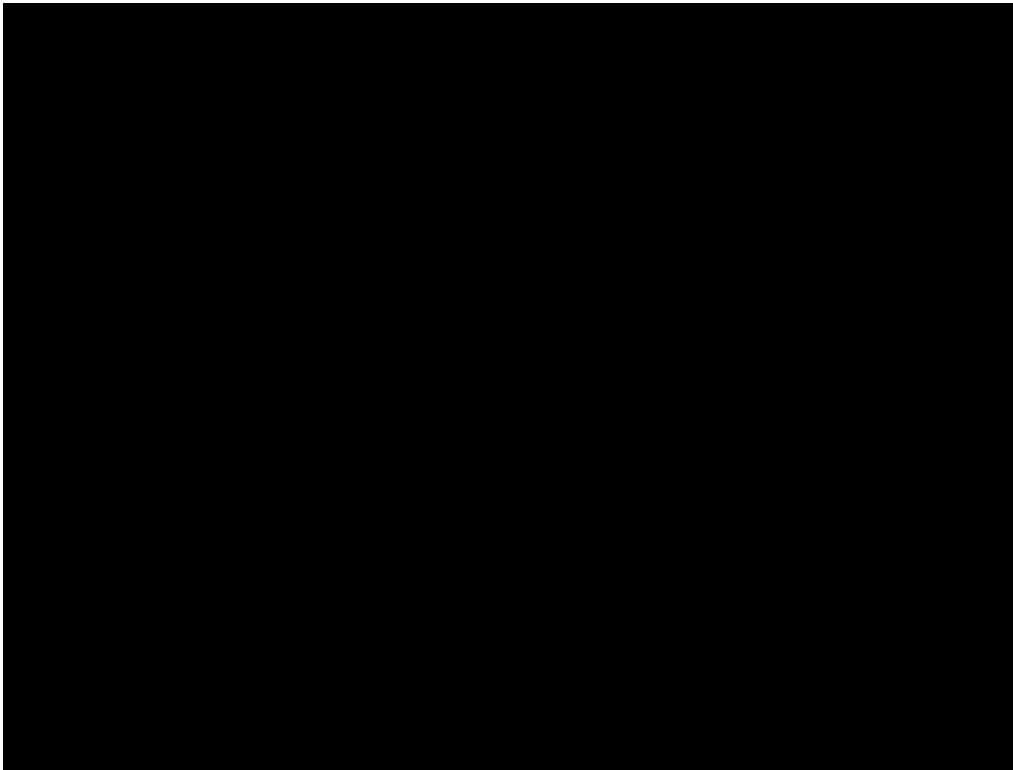
The Services based the rate structure argument in their initial submission on a purported "debunk[ing]" of the "see-saw theory." The crux of this argument was a claim that, following the Final Determination, musical works rates increased while sound recording rates did not decrease, which the Services argued proved the "collapse of the see-saw theory"—a theory that the Services incorrectly assert was the basis for the rate structure adopted in the Final Determination.

The Services' argument was surprising in part because it was fundamentally at odds with the economic theory but also the facts in their own royalty statements. The Services thus made this argument without putting any of the relevant royalty statements into evidence, and then stonewalled on discovery to avoid producing the royalty statements before the reply papers were due, conduct that the Judges have since ruled was improper. Unfortunately for the Services, their royalty statements could be obtained from other sources (although much of the other evidence that they improperly withheld could not be), and Copyright Owners marshalled that evidence to disprove the deceptive case put forward by the Services in their initial submission.

Caught red-handed by their own royalty statements, the Services now file the Motion to suppress the evidence. Even more remarkably, the Motion is made in the face of the Judges' ruling establishing that the very evidence they seek to exclude—their own royalty statements—directly relates to the Services' initial submission.

The Motion thus boils down to claims that: (1) Copyright Owners should not be allowed to use evidence on rebuttal that the Judges have already ruled is directly related to the Services' direct testimony, and (2) the Services were "blindsided" on rebuttal by their own royalty statements that they had wrongly withheld in discovery. Both positions are meritless. The Rebuttal Reports directly respond to Service testimony, and in particular to the Services' illogical, unsound and factually incorrect "collapsed see-saw" argument. In just the portions of the Rebuttal Reports that the Services seek to strike, there are more than *thirty* direct citations to the Services' initial submission being rebutted.

As just one example of the Services' outlandish position, they seek to strike this chart from Dr. Eisenach's report as not being rebuttal:



(Remand Written Rebuttal Testimony of Jeffrey Eisenach, eCRB Docket No. 25425 (July 2, 2021) ("Eisenach Rebuttal Report"), Figure 10.) This figure takes a figure straight from the direct report of Service expert Dr. Leslie Marx (Written Direct Remand Testimony of Leslie Marx, eCRB

Docket No. 23852 (Apr. 1, 2021), Figure 6), and adds certified Spotify royalty data that Dr. Marx omitted to reveal the misleading nature of her figure. It is hard to conceive of a piece of evidence that is more thoroughly rebuttal evidence than this figure, yet the Motion offers the incorrect argument to the contrary.

Indeed, the Motion presents an unnerving day-is-night argument. The Services' initial submission argued that their royalty rates [REDACTED]. Dr. Eisenach used their own records to show that [REDACTED]. The Services now seek to suppress their own records for the obvious reason that they rebut their assertions, on the specious claim that they are not rebuttal.

The Rebuttal Reports are miles beyond the threshold for constituting proper rebuttal evidence. As discussed below, rebuttal evidence is not required even to directly address specific testimony, but can simply address a rate proposal or underlying principles. Nevertheless, the Rebuttal Reports all do directly relate to specific testimony. Prof. Watt's report meticulously dismantles the economic arguments of the Services' experts, showing why their attempts to misstate bargaining theory to attack the Final Determination fail and why their "collapsed see-saw" argument makes no sense. Prof. Spulber's report also directly responds to the Services' bargaining theory attacks on the Final Determination, as well as the Services' arguments concerning record company complementary oligopoly. Dr. Eisenach's report exposes the disingenuous nature of the Services' depiction of their royalty history, in which they quite literally claimed that down was up. And despite the Services' empty cavil, there is nothing to debate about the evidence. It is not subjective forecasting or guessing. Dr. Eisenach takes the Services' own royalty statements and places them in clear charts and tables for the Judges. *Not a single Service*

disputes the authenticity of these royalty statements (that they certified), which are appended to Dr. Eisenach’s report for the Judges’ review and complete transparency.

The Motion also must be considered in the light of the Judges’ Order on Copyright Owners’ Motion to Compel (eCRB Docket No. 25442 (July 14, 2021) (“Order to Compel”).) The Order to Compel ruled that the *exact* evidence laid out by Dr. Eisenach—the Services’ royalty pool calculations—was “directly related” to the Services’ initial submissions and should have been produced in discovery prior to submission of the rebuttal reports.¹ Even further, the Order to Compel confirms that the subject matter addressed in the Rebuttal Reports is directly related to the Services’ initial submission, including: the impact (or lack thereof) of the *Phonorecords III* rates on the Services; the Services’ royalty histories; and questions of label market power and complementary oligopoly classification.

Unable to show that the Rebuttal Reports are not rebuttal evidence, the Services turn to an argument that the rebuttal evidence should be precluded because it could have been offered in the initial submission. In effect, the Services argue that the Copyright Owners had the burden of both anticipating the arguments the Services would make in their initial submission and also anticipatorily rebutting those arguments. As discussed below, that is not the law.²

¹ The Services complain that Copyright Owners obtained their royalty statements from the Mechanical Licensing Collective (“MLC”) (a frivolous complaint since the MLC has statutory authority to “gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under [Section 115]”), but these were simply the royalty statements that the Services improperly refused to produce in discovery.

² Moreover, it would not be reasonable to expect anyone to anticipate the Services’ bizarre rate structure argument on this remand, in which they abandoned the argument they made on appeal to procure the rate structure remand—that they had been deprived of the opportunity to show the “runaway” rates and disruptive impact an across-the-board “uncapped” TCC (“true TCC”) would bring—and instead plucked a statement from the Board’s rate percentage derivation to construct their entire rate structure argument, misrepresenting the Final Determination and established economic theory and blatantly contradicting their own royalty statements.

Finally, the Services desperately accuse Copyright Owners of not identifying evidence on the rate structure issue in their initial submission, implying that Copyright Owners violated the Judges’ Scheduling Order. (Motion at 3.) This is not the case. Copyright Owners had submitted a remand plan proposing simultaneous briefing on the two other remand issues, with the Services alone submitting an initial case on rate structure to which Copyright Owners would reply (since the rate structure remand was explicitly to afford the Services the opportunity to present evidence they claimed they had not had an opportunity to submit).³ However, the Judges directed simultaneous initial and reply submissions on all three issues, and Copyright Owners followed that direction, submitting a full case and citing to voluminous admitted evidence on *all three issues*. In just the initial submission on the rate structure issue alone, Copyright Owners cited more than 100 pieces of evidence in the record, including nearly 50 admitted hearing exhibits, 25 portions of oral hearing testimony and dozens of court filings, in support of their arguments.⁴ (See Copyright Owners’ Initial Remand Submission, eCRB Docket No. 23854 (Apr. 1, 2021) (“CO Initial Remand Submission”).) This evidence speaks, *inter alia*, to the revenue diminution by the Services, the ineffectiveness of the “capped” TCC prong, and the need for alternative rate prongs. In contrast to this affirmative evidence detailed in Copyright Owners’ initial submission, the Rebuttal Reports respond to the arguments proffered by the Services in their initial submission.

³ The Services knew this was the remanded issue, as *their own remand proposal* summarized the rate structure remand issue as, “the Services ‘were not only deprived of the opportunity to voice their objections to a completely uncapped total content cost prong, they were also given no opportunity to address the interplay between that rate structure and the increased revenue and total content cost rates.’” *Services’ Proposal for Remand Proceedings*, eCRB No. 23383 at 3 (Dec. 10, 2020) (quoting *Johnson v. Copyright Royalty Board*, 969 F.3d 363, 383 (D.C. Cir. 2020)).

⁴ In contrast, the Services appear to have conceded that the hearing record contained no evidence in their favor on the rate structure issue, as they cited virtually no evidence from the hearing record in their initial submission or their reply submission on the rate structure issue.

Thus, the Services’ claim that Copyright Owners “failed to submit *any* evidence in support of their direct-phase submission” (Motion at 5, emphasis in original) far misses the mark. Copyright Owners cited substantially *more* evidence than the Services did on *every* issue, including rate structure. Even more importantly, Copyright Owners cited to accurate and compelling evidence, not testimony that was so thoroughly discredited on rebuttal that the Services’ sole option now is a desperate motion to exclude the damning rebuttal evidence.

I. STANDARDS ON THE MOTION

A. Scope of rebuttal evidence

Contrary to the Services’ arguments, the scope of rebuttal evidence is broad. The Judges confirmed this in denying a motion by Copyright Owners to exclude rebuttal evidence filed by Amazon in this *Phonorecords III* proceeding (the “Klein Motion”). The Klein testimony was unrelated to any specific direct testimony, but rather was relied upon by other witnesses who submitted “written rebuttal testimony criticizing the Copyright Owners’ rate proposal and its underlying principles.” (Order on Excluding Testimony, eCRB Docket No. 13837 (July 24, 2017) (“Klein Order”), at 2.) The Judges declined to exclude the testimony, holding that, “[r]ebuttal testimony *need not address a specific direct witness’s testimony but may properly rebut the subject matter of direct evidence.*” (*Id.*)⁵

As Amazon successfully asserted in its opposition to the Klein Motion:

“The proper function of rebuttal evidence is to contradict, impeach, or defuse the impact of the evidence offered by an adverse party.” “[T]here is no requirement that [a rebuttal report] mention [a direct expert] by name when offering opinions to contradict or rebut those offered by [the direct expert].” Simply, “[*r*]eports are proper rebuttal reports if they contradict or rebut the subject matter of” direct reports.

⁵ Unless otherwise indicated, all emphases in this brief are supplied, and all internal citations and quotations are omitted.

(Amazon’s March 1, 2017 Opposition to Klein Motion at 8.)⁶ Amazon successfully argued against exclusion of the Klein testimony even though it lacked reference to direct testimony, yet now seeks to exclude rebuttal replete with specific citation to direct testimony that it explicitly contradicts and rebuts.

Also contrary to the Services’ arguments, rebuttal evidence is not subject to exclusion merely because it could have been offered in a direct submission. Amazon conceded this point as well in its opposition to the Klein Motion:

Nor is rebuttal testimony precluded simply because it could have been offered in a party’s case in chief. See, e.g., Bell v. AT&T, 946 F.2d 1507, 1512 (10th Cir. 1991) (“that the evidence may have been offered in the plaintiff’s case-in-chief does not preclude its admission in rebuttal”); Crowley v. Chait, 322 F. Supp. 2d 530, 551 (D.N.J. 2004) (“Such a rule would lead to the inclusion of vast amounts of arguably irrelevant material in an expert’s report on the off chance that failing to include any information in anticipation of a particular criticism would forever bar the expert from later introducing the relevant material. All that is required is for the information to repel other expert testimony. . . .”) (Id.)

The Judges have repeatedly confirmed this holding. In *Web V*, SoundExchange moved to strike Pandora’s rebuttal evidence, arguing, just as the Services argue here, that it should have been submitted on direct. The Judges ruled in Pandora’s favor and denied the motion, despite the fact that “[t]he Judges recognize[d] that Pandora could have reasonably predicted that SoundExchange would advance the ‘Must Have’ theory in its direct case, given the application of this theory in prior royalty rate proceedings,” because:

such “mindreading,” however prescient, does not require a participant to include relevant substantive rebuttals in its own direct case. The Judges’ Rules certainly do not require such clairvoyance, and the Judges do not find it appropriate to infer such a requirement.

⁶ The eCRB docket does not appear to contain the Klein Motion papers (although the submission’s cover letter is at eCRB Docket No. 13793). Copyright Owners can provide those papers upon request if they are unavailable.

(Order Denying SoundExchange Motion to Strike, *Web V*, eCRB Docket No. 22072 (Apr. 9, 2020) (“Reiley Order”).)

The Services in their Motion rely heavily on the *SDARS II* Order.⁷ (Motion at 5, 7, 8, 9, 10, 13, 14.) But the Judges in the Reiley Order explicitly distinguished the *SDARS II* Order and other oral rulings cited by SoundExchange as “merely reiterat[ing] the undisputed point that proffered rebuttal testimony that fails to address issues raised in an adversary’s direct case cannot meet the requirements for admissible rebuttal testimony.” (Reiley Order at 5.) The Judges stated that the *SDARS II* Order and the other rulings cited by Sound Exchange do not apply “where the proffered testimony serves as valid rebuttal testimony, notwithstanding that it could also have served as direct testimony.” (*Id.*) The Services thus cite seven times to an order that was explicitly distinguished by the Judges in the Reiley Order in rejecting the same argument the Services make here. This is all the more strange considering Pandora litigated the motion leading to the Reiley Order yet now argues the opposite proposition in this Motion, ignoring the Judges’ prior ruling in its favor.⁸

B. Burden to show disruption

In the very first paragraph of the Motion, the Services attack Copyright Owners for failing to prove that no disruption to the Services occurred. (Motion at 1.) This backwards argument is

⁷ Order on Music Choice’s Motion to Strike and Sirius XM’s Motion to Strike, *SDARS II*, (Aug. 3, 2012) (“*SDARS II* Order”), at 2.

⁸ The Judges in the Reiley Order chastised SoundExchange for the same duplicity engaged in by Pandora here—ignoring a prior ruling in its favor while arguing the exact opposite position in a subsequent case. (Reiley Order, 6, n. 6.) The same litigation inconsistency carries over to Amazon, who in successfully opposing to the Klein Motion took the opposite position that Amazon takes here and explicitly distinguished another case Amazon and the other Services now rely on for the opposite position. In the Klein Motion, Amazon explained why *Settling Devotional Claimants v. Copyright Royalty Board*, 797 F.3d 1106 (D.C. Cir. 2015) also does not contradict the Judges’ consistent rulings that rebuttal evidence cannot be excluded based on the argument that it could have also been introduced in a direct submission. (Amazon Opposition to Klein Motion at 11–12.)

both factually wrong and legally inapposite. The burden of proving disruption falls on the party claiming disruption. *See SDARS III*, 83 Fed. Reg. 65,210, 65,225 (Dec. 19, 2018) (rejecting disruption arguments where participants claiming disruption failed to provide sufficient evidence supporting their proposed adjustments); *SDARS II*, 78 Fed. Reg. 23,054, 23,060–61 (Apr. 17, 2013) (rejecting argument “that the current rate is disruptive” on the grounds that the party arguing disruption “failed to put forward any evidence” supporting that claim); *Phonorecords I*, 74 Fed. Reg. 4510, 4,525 (Jan. 26, 2009) (rejecting disruption arguments by RIAA and DiMA as “not adequately supported by evidence”).⁹

C. The structure of remand submissions

The Services equate these remand submissions to written direct and rebuttal submissions in normal ratesetting proceedings. (Motion at 4–6.)¹⁰ While Copyright Owners agree there is no reason to consider the broad scope of rebuttal evidence to be different here, Copyright Owners do object to the wholesale equation of these remand proceedings to normal ratesetting proceedings, particularly the Services’ suggestion that the initial remand submission was to set forth the evidence each party intends to rely upon “in establishing its own proposal.” (Motion at 4.) Nothing in the Scheduling Order provided for new rate proposals, and the evidentiary record remains closed except on the narrow issue of the expansion of the true TCC to additional offerings. The Services’ submission of a new rate proposal (seeking the lowest royalty rates in the history of interactive streaming) was unauthorized, and Copyright Owners wholly disagree that the remand

⁹ Copyright Owners in fact *did* present existing record evidence in their initial submission that there was no basis to expect disruption. (CO Initial Remand Submission at 50-68.)

¹⁰ The Services do not reconcile their position here with their contrasting position in their opposition to the Copyright Owners’ motion to strike the exhibits attached to their reply brief, in which they argue that there would be no precedent from a ruling in this remand proceeding “which, by virtue of being a remand proceeding, is different from a normal-course rate-setting proceeding.” (Services’ Joint Opposition to Motion to Strike, eCRB Docket No. 25557 (Aug. 3, 2021) at 3.)

submissions were about establishing proposed rates and terms. As everyone agreed, the remand was about resolving three extremely narrow issues.

II. ARGUMENT

A. The Rebuttal Reports far exceed the threshold for allowable rebuttal evidence

1. The Order to Compel confirms that the topics in the Rebuttal Reports are directly related to the Services' initial submission

The Order to Compel examines in detail numerous discovery requests by Copyright Owners and identified numerous topics that are “directly related” to the written direct testimony of Service witnesses. (Order to Compel at 8.) The portions of the Rebuttal Reports that the Services seek to challenge *all* relate to topics that the Judges explicitly held in the Order to Compel directly relate to the Services' written direct testimony. This fact alone warrants denial of this Motion. Indeed, the standard that the Judges applied for granting discovery in the Order to Compel is narrower than the standard for allowable rebuttal evidence. As discussed above, rebuttal evidence need not be tied directly to witnesses' statements, but may address another participant's rate proposal or the principles or subject matter of the other participant's proposal or submission. Nonetheless, the Rebuttal Reports also easily pass muster as directly related to specific testimony of Service witnesses.

(a) Impact

The Services argue that Dr. Eisenach's report is not rebuttal evidence because it addresses the question of disruption and impact on the Services. The Order to Compel recognized that the Services' direct testimony *did* include contentions about impact (even if they did not provide actual, probative evidence of impact), and the Judges specifically found that the following topics *directly relate to the Services' written direct testimony*:

Identify and describe the disruption or other impact the TCC Prong has had on You or Your company growth, revenues, profits, company value, brand, or ecosystem.

and:

All Documents concerning the actual or expected impact that the TCC rate prong adopted in the final determination in this proceeding published at 84 Fed. Reg. 1918 (February 5, 2019) has had or will have on company growth, revenues, profits, company value, brand, or ecosystem.

(See Order to Compel at 8-9, 15 and 22 (granting motion as to Interrogatory 4 and RFP 29, citing to Service witness testimony concerning, *inter alia*, “material real-world effect,” “downside risk,” and “purported disruptive risks”).) It is plainly appropriate for Copyright Owners to submit rebuttal evidence concerning disruption and impact—topics the Judges already ruled directly relate to the Services’ direct testimony.

(b) Royalty history

The portions of Dr. Eisenach and Prof. Watt’s reports that the Services seek to exclude are analyses of the Services’ monthly mechanical royalty pool calculations. The Judges ruled unequivocally that these calculations directly relate to the Services’ written direct testimony. The Order to Compel found that *every Service* should have provided monthly “step-by-step royalty pool calculations (as required under 37 CFR Part 210).” (Order to Compel at 9, 17, 22, 27 (granting motion as to RFP 5, citing to Service witness testimony including, *inter alia*, “Pandora’s assertion that the see-saw effect has not occurred,” Dr. Leonard’s assertion that, “[REDACTED]” and testimony concerning which rate prong would bind and “[REDACTED]”).)

To be clear, the pool calculations the Judges ordered to be produced *are* the royalty evidence Dr. Eisenach lays out in his Rebuttal Report. The fact that the Judges have ruled that

they directly relate to witness testimony means that they easily clear the lower threshold for being allowable rebuttal evidence.¹¹

(c) Label market power

The Services also object to Prof. Spulber's discussion of label complementary oligopoly. Here again, the Order to Compel ruled that this topic *directly relates* to the Services' direct testimony. (Order to Compel at 16, 22, 29 (citing to Written Direct Remand Testimony of Dr. Leonard, Dr. Marx, and Prof. Katz, respectively).)

2. The Eisenach Rebuttal Report

As noted above, the Eisenach report deals with the topics of royalty history and impact that the Judges have ruled are directly related to the Services' direct testimony. It also includes *thirty* citations to the Services' testimony, underscoring the rebuttal nature of the analysis. The thrust of the Services' argument is that Dr. Eisenach could have done the royalty analysis in a direct report. As discussed above, even if this were true, it is also irrelevant, as there is no obligation to anticipatorily set forth rebuttal arguments in a direct statement. But it is also an absurd assertion. Even if Dr. Eisenach had reviewed the Services' royalty statements in advance, he could not have predicted the testimony that the Service witnesses were going to proffer on direct. Why would Dr. Eisenach have predicted that Spotify's witnesses would claim [REDACTED], especially when it was public knowledge that Spotify's mechanical royalty rate went down? (Eisenach Rebuttal Report, ¶ 32.) How could Dr. Eisenach have predicted that Dr. Marx would incorrectly claim that [REDACTED] and would submit a

¹¹ The history of actual royalty pool calculations under rates established by the Judges is so basic and central to the entire subject matter of these rate proceedings that it is hard to envision a situation in which it would not be allowable to lay out those facts. For example, it would be appropriate to do so to "criticize [a] rate proposal and its underlying principles," and since the Services inappropriately submitted a new rate proposal with their initial submission, it would be appropriate for that reason alone.

misleading figure on this point? (*Id.*, ¶¶ 37-43.) Likewise, it was not predictable that Pandora’s witness would testify that [REDACTED] and that Pandora’s undisputed royalty statements would show that statement to be blatantly false. (*Id.* at ¶¶ 29-30.) Nor was it predictable that Dr. Leonard would incorrectly testify that, [REDACTED], [REDACTED],” and that Google’s certified royalty statements would show this statement to be blatantly false. (*Id.* at ¶¶ 25-27.) Nor was it predictable that Amazon’s witness would testify about “[REDACTED]” and contest the “see-saw theory,” and that Amazon’s own certified royalty statements would show [REDACTED]. (*Id.* at ¶¶ 19-23.) The claim that Dr. Eisenach’s direct rebuttal of these assertions is not rebuttal testimony is frivolous.

3. The Watt Rebuttal Report

The main section of Prof. Watt’s report to which the Services object (¶¶ 10-27) involves his analysis of the Board’s reference to bargaining theory in the Final Determination. The Services incredibly claim that this analysis is “untethered to the Services’ written direct remand testimony,” yet it cites that testimony directly *nine times*, meticulously dismantling the direct testimony of Drs. Katz and Marx. The Services object that Prof. Watt testifies “that the Majority got it right in relying on his prior testimony.” (Motion at 14.) But the Services’ core argument in their direct submission was that the Majority got it *wrong* in relying on his testimony! The title of an entire section in Dr. Katz’s report is that Prof. Watt’s bargaining theory analysis “as utilized by the Majority” is inconsistent, uses inappropriate assumptions, and is contradicted by actual market outcomes. (Written Direct Remand Testimony of Michael Katz, eCRB Docket No. 25853 (Apr. 1, 2021), Section III.) It is hard to think of rebuttal evidence that could be more relevant and direct than explicitly addressing that assertion by explaining how the bargaining theory “as utilized by

the Majority” was in fact sound and consistent with the actual market outcomes. The Services’ objections again do not withstand scrutiny.¹²

4. The Spulber Rebuttal Report

The Services’ arguments go further off the rails as to Prof. Spulber’s report. They claim that Prof. Spulber’s alleged “effort to prop up the see-saw theory that the Majority used... is not rebuttal,” but instead supports the Copyright Owners’ position that the see-saw theory is valid. (Motion at 11.) But again, the “see-saw theory” is *the Services’* core argument on direct. Copyright Owners reference the see-saw theory in just one subsection of their initial submission, along with a single reference to bargaining theory. Copyright Owners’ direct arguments as to the rate structure issue are built around the overwhelming evidence in the record concerning revenue diminution and the need for an effective alternative royalty prong, together with many admissions by the Services—as well as their own rate proposals—that support the reasonableness of, and need for, the true TCC prong.

In contrast, the Services’ initial submission references the “see-saw” and bargaining theory *more than 220 times*. They list the “see-saw” *ten times* just in the six-page summary of their direct testimony. It is ludicrous for them to argue that rebuttal testimony about the “see-saw” or

¹² The Services also contend that Prof. Watt should be precluded from referencing the testimony of Dr. Eisenach in his report (Motion at 14), but offer no basis for such preclusion. Expert witnesses routinely reference or incorporate evidence from other witnesses in their reports. Both Drs. Marx and Katz did so in their direct remand submissions. And most of the Services’ fact witnesses did not attach evidence of their royalty claims (unlike Dr. Eisenach), claims which turned out to be incorrect after being reiterated by Drs. Marx and Katz (who did no empirical analysis).

bargaining theory is not rebuttal when they raised the topics *literally* hundreds of times in their direct papers.¹³

III. The complaint about an “evidentiary dump” of royalty statements obtained from the Mechanical Licensing Collective is a red herring

The Services cast vague aspersions about royalty statements obtained from the MLC (the “Service Royalty Statements”), while sidestepping that the statements at issue are simply the Services’ own certified royalty statements as delivered by the Services to the MLC. There is no basis for complaint, either with respect to the procedure or the substance of the statements.

With respect to procedure, 17 U.S.C. 115(d)(3)(C)(i)(XI) provides explicit statutory authority for the MLC to “gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under [Section 115].” The Copyright Office issued regulations that govern the MLC’s provision of such documentation. 86 Fed. Reg. 9,003 (Feb. 11, 2021). The regulations provide that the MLC or the Digital Licensee Coordinator (“DLC”) “may disclose Confidential Information to... [a]ttorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order or agreement.” 37 C.F.R. 210.34(c)(4)(iii). The Service Royalty Statements were produced to the Copyright Owners’ attorneys in this proceeding, as Restricted materials subject to the protective order. The disclosure was authorized by statute, and the procedure fully complied with the statute and the regulations.

¹³ The Services also object to Prof. Spulber discussing complementary oligopoly, but as discussed above, the Judges already ruled in the Order to Compel that this subject matter directly relates to the Services’ direct testimony.

Furthermore, the regulatory language cited above is based on a proposal by the DLC and identical to the final language the DLC proposed.¹⁴ The Board of Directors of the DLC includes representatives of all four of the Services, and the law firm that proposed the language on behalf of the DLC is counsel for Spotify in this proceeding. There is no basis for Service complaint about disclosure pursuant to their own proposed regulatory language to implement a statutory mandate.

Nor were the Services blindsided by the Service Royalty Statements, which are the monthly royalty pool statements each Service was obligated to certify and to provide to copyright owners owed compulsory royalties. 37 CFR 210.16 (2018). While the Copyright Owners have designated and maintained all of this data as Restricted, it can hardly be considered sensitive, nor can its disclosure be considered surprising, since the Copyright Office has established that, “once a royalty statement has been delivered to a copyright owner, *there are no restrictions on that copyright owner’s ability to use the statement or disclose its contents.*” 86 Fed. Reg. 9,007 (Feb. 11, 2021). Thus, the royalty statement information Dr. Eisenach analyzes could be publicly disseminated by any of the thousands of recipients of the monthly statements, a fact of which the Services are well aware, as their counsel at the DLC submitted comments on this issue during the Copyright Office’s rulemaking.¹⁵

IV. The Services’ surrebuttal arguments demonstrate why there is no need for a surrebuttal

The Services’ request for a surrebuttal should be rejected for multiple reasons. The Services cannot possibly have suffered prejudice by being confronted *with their own royalty*

¹⁴ See Comments of Digital Licensee Coordinator, Inc. in Response to Notice of Proposed Rulemaking (June 8, 2020) (“DLC Comments”) at A-4, available at <https://www.regulations.gov/comment/COLC-2020-0004-0010>.

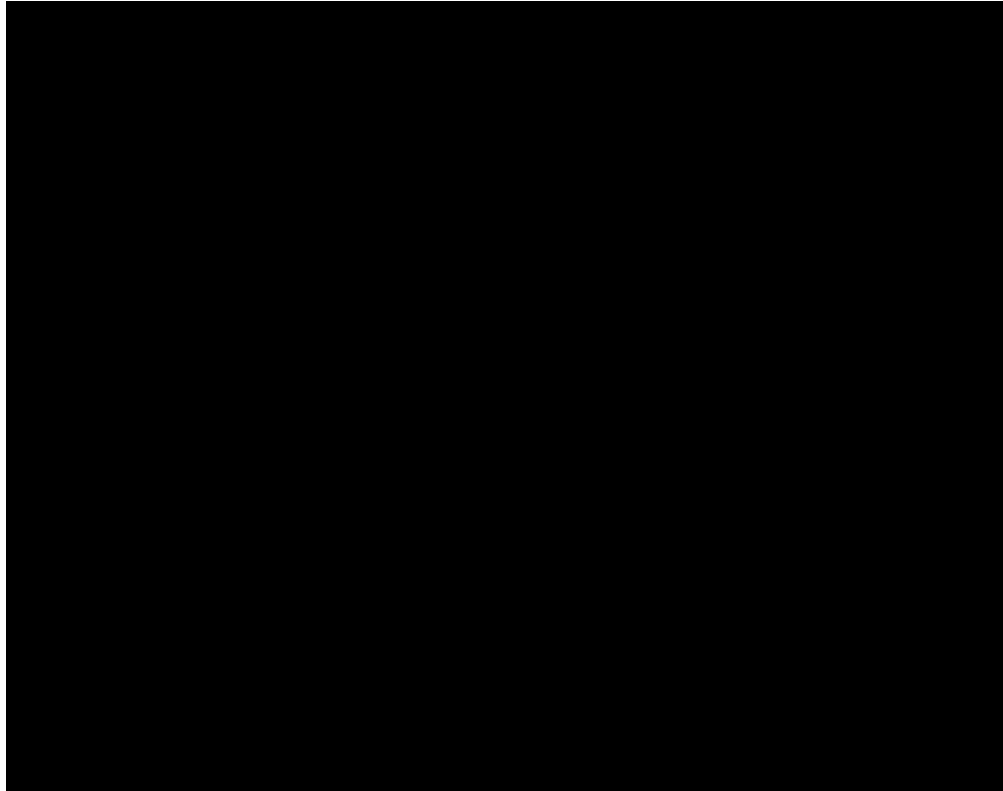
¹⁵ See DLC Comments at 7.

statements that they improperly withheld in discovery. The only prejudice is to Copyright Owners from the Services’ refusal to comply with discovery, which would only be compounded were they rewarded for that noncompliance with an additional substantive submission.

Second, the Services have already (improperly) provided their surrebuttal in the final section of their Motion, which runs more than 1,000 words over the 5,000-word limit under the Board’s rules.¹⁶ Indeed, the seven surrebuttal arguments that the Services lay out in this section show the lack of merit in their proposed surrebuttal:

- The Services’ arguments about [REDACTED] is not surrebuttal if only because it completely misses the point. As Watt (*e.g.*, ¶¶ 32-39, 41, 46, 51), Eisenach (*e.g.*, ¶ 9) and Spulber (*e.g.*, ¶52) all note, the Board’s bargaining theory insights were correct *regardless* of whether [REDACTED]. But what [REDACTED] *does* do is eliminate any reasonable basis for speculating that there was a “collapsed see-saw” (which is all the Services can do, since they do not offer any empirical bargaining analysis), and that is true regardless of why [REDACTED]. (This point applies to the Services’ first, second and fourth bulleted surrebuttal arguments.) The Eisenach Rebuttal Report also directly rebuts the claim that royalty rates [REDACTED], a claim the Services made without reference to cause. (*See, e.g.*, Leonard WDRT ¶17.)
- The Services’ second bulleted surrebuttal argument also complains that Dr. Eisenach [REDACTED]. This argument is likewise hollow. For one thing, the Services’ “corrected” reduction is admittedly still [REDACTED], which is [REDACTED] which is the end of the inquiry for their speculative “collapsed see-saw.” Further, the body of his report includes a full chart [REDACTED] as well, which shows [REDACTED] and even that [REDACTED] every year across the *Phonorecords III* Rate Activity period:

¹⁶ Copyright Owners are forced to go over the word limit as well here to address those arguments, but respectfully propose that the final sections of both briefs can be struck.



(Eisenach Rebuttal Report, Figure 2.)

- The Services' third bulleted surrebuttal argument complains about the undisputed fact that [REDACTED]. Spotify publicly announced this reduction and clawed back royalties, so it is mystifying why it thinks it can evade that reality now through hair splitting. Even more amazing is the attack that, "Dr. Eisenach engineers this conclusion by [REDACTED]. [REDACTED] was *not* Dr. Eisenach's choice. Spotify has since inception [REDACTED]. (Eisenach Rebuttal Report, Exhibit D.) Despite the Judges' requirement that "royalties must be calculated separately with respect to each Offering," (37 CFR 385.12(b) (2016), 37 CFR 385.21(b) (2019)), [REDACTED]. Dr. Eisenach even states in his report that, "Spotify's royalty statement data [REDACTED]. That is, Spotify provides a [REDACTED]." (Eisenach report at C-3.) Copyright Owners sought [REDACTED], but Spotify refused to

provide it. Spotify thus accuses Dr. Eisenach of its own crime of obscuring the truth by [REDACTED]. However, Spotify has at least now admitted that [REDACTED]

[REDACTED] Copyright Owners expect that Spotify will follow through and [REDACTED], and await Spotify's reply comments on this point.

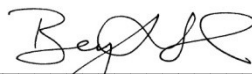
- The Services' fifth bulleted surrebuttal argument is a strange admission by [REDACTED] There is nothing in the regulations that allowed [REDACTED] to "[REDACTED]" (Motion at 17.) On the contrary 37 CFR 210.16(d) (2018) provided only for estimation of public performance royalties. Worse yet, [REDACTED] (Motion at 17) TCC is defined to be equivalent to actual sound recording royalty payments, and [REDACTED] royalty statement certification attests that the "data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith." It is entirely inappropriate that [REDACTED].
- The Services' sixth bulleted surrebuttal argument is a non-sequitur that also misses the point. The fact that the labels and Services will take the compulsory rate into account hardly means that the sound recording rate will decrease. Prof. Watt explains this at length, and Dr. Katz [REDACTED] (Watt Rebuttal Report, ¶¶ 28-39.) In any event, the Services' reference here to the "factual record in these remand proceedings" and their citation to their Joint Opening Brief shows that this issue has been fully briefed.
- The Services' seventh bulleted surrebuttal argument is pure legal argument on a fully briefed issue. The Services do not need a surrebuttal in order to tell the Judges that they believe Prof. Spulber's analysis is at odds with the Judges' findings.

V. CONCLUSION

Copyright Owners respectfully request that the Judges deny the Motion in full and grant such other and further relief as the Judges find appropriate.

Dated: August 10, 2021

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Counsel for Copyright Owners

Before the
UNITED STATES
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR (2018–2022)
(Remand)

**DECLARATION OF BENJAMIN K. SEMEL
REGARDING RESTRICTED INFORMATION**

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers’ Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI” and, together with the NMPA, the “Copyright Owners”) in the above-captioned proceeding (the “Proceeding”).

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 28, 2016 (the “Protective Order”), I submit this declaration in connection with Copyright Owners’ Opposition to Services’ Motion to Strike Portions of Copyright Owners’ Rebuttal Testimony (the “Opposition”).

3. I have reviewed the Opposition. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions that the Copyright Owners have indicated are to be made to the Opposition and that they will make in the publicly filed version of the Opposition is necessitated by the designation of one of the participants in this proceeding as “Confidential Information” under the Protective Order. Because the Copyright Owners are bound under the Protective Order to treat as “Restricted” and to redact information designated

“Confidential Information” by participants, they are doing so. Copyright Owners reserve all rights and arguments as to whether any such information is, in fact, “Confidential Information.”

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: August 10, 2021
New York, New York

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Proof of Delivery

I hereby certify that on Tuesday, August 10, 2021, I provided a true and correct copy of the Opposition to Services' Motion to Strike Copyright Owners' Expert Testimony (PUBLIC) to the following:

Google LLC, represented by David P Mattern, served via ESERVICE at dmattern@kslaw.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Spotify USA Inc., represented by Richard M Assmus, served via ESERVICE at rassmus@mayerbrown.com

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Signed: /s/ Benjamin K Semel